



**APPLICATION OF THE
ARBITRATION AND CONCILIATION
(AMENDMENT) ACT, 2015:
RETROSPECTIVE OR
PROSPECTIVE**

*By Harshit Goel
From Government Law College, Mumbai*

The Arbitration and Conciliation (Amendment) Act, 2015¹ (hereinafter referred to as the “Amendment Act”) had a celebrated entry in the Indian Arbitration regime. In August 2014, the Law Commission of India had published its 246th Report reviewing the provisions of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the “Act”).² The key recommendations of the report has now become a reality in the form of the Amendment Act, which came into force on October 23, 2015.

Section 26³ of the Amendment Act provides for the applicability of the Amendment Act. The section is divided into two parts. The first part provides that the Amendment Act would not apply to arbitral proceedings

which commenced before the commencement of the Amendment Act in accordance to Section 21⁴ of the Act. But if the parties to the arbitration agrees then the Amendment Act could be applied to arbitral proceedings which commenced before October 23, 2015. The second part of Section 26 provides that the Amendment Act would apply in relation to arbitral proceedings which commenced on or after the date of commencement of the Amendment Act.

This section gave birth to different opinions on the interpretation of the phrases “to arbitral proceedings” and “in relation to arbitral proceedings” used in the section.

This article will first analyse the jurisprudence on the prospective and retrospective application of any statute. It will then present the different views taken by the Supreme Court and the High Courts of Calcutta, Bombay and Delhi on the interpretation of Section 26. The article will conclude with the views of the author regarding the interpretation of Section 26 and Prospective application of the Amendment Act.

General Principle of the Applicability of a Statute

The cardinal principle of construction of law is that every statute is prospective unless it is expressly or by necessary implication made

¹Arbitration & Conciliation (Amendment) Act, 2015, No. 3 of 2016 (India)

² Law Commission of India, Report No. 246, Amendments to Arbitration and Conciliation Act, 1996 (Available At: <http://lawcommissionofindia.nic.in/reports/report246.pdf>)

³ 26. **Act not to apply to pending arbitral proceedings.**-Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of section 21 of the Principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this act.

⁴ 21. **Commencement of arbitral proceedings—** Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.



to have a retrospective operation.⁵ When the object of the statute is to affect vested rights or to impose new burdens or to impair existing obligations, it is deemed to be prospective only, unless there are words in the statute sufficient to show the intention of the legislature to affect existing rights. However, when the statute deals with merely procedural matters, it is deemed to be retrospective, unless such a construction is textually inadmissible.⁶ No person has vested right in any course of procedure.⁷

In *Thirumalai Chemicals Limited v. Union of India and Others*⁸, Supreme Court held that though it may be true that amendments to procedural laws can be applied retrospectively, procedural statutes, which affect the rights of the parties, cannot be applied retrospectively.

The view of Calcutta High Court

In *Sri Tufan Chatterjee v. Sri Rangan Dhar*,⁹ the issue before the Calcutta High Court was whether the Court has been deprived of

⁵ *Zile Singh v. State of Haryana and others*, 2004 (8) S.C.C. 1.

⁶ *Delhi Cloth and General Mills Co. Ltd. v. CIT*, A.I.R. 1927 P.C. 242. See also: In *Hitendra Vishnu Thakur and Others v. State of Maharashtra and others* 1994 (4) S.C.C. 602, the Supreme Court held that a statute that affects substantive rights is presumed to be prospective in operation, unless made retrospective, either expressly or by necessary intendment. Furthermore, the law relating to forum and limitation is procedural in nature, whereas the law relating to action and right of appeal, even though remedial, is substantive in nature.

⁷ *Anant Gopal Sheorey v. State of Bombay*, A.I.R. 1958 S.C. 915.

⁸ *Thirumalai Chemicals Limited v. Union of India and Others*, 2011 (6) S.C.C. 739.

⁹ *Sri Tufan Chatterjee v. Sri Rangan Dhar*, Fmat No. 47 of 2016 (Calcutta High Court)

power to grant interim relief under Section 9 of the Act from the date on which the Amendment Act came into force¹⁰, if an Arbitral Tribunal has been constituted, and arbitral proceedings have commenced.

Section 9(3) of the amended Act provides that once the Arbitral Tribunal has been constituted, the court shall not entertain an application under Section 9(1), unless the court finds that circumstances exist, which may not render the remedy provided under Section 17 efficacious.

The High Court held that the arbitral proceedings can be said to have commenced, when a request for reference to arbitration made by the Claimant is received by the Respondent and/or the competent authority under the arbitration agreement. The arbitral proceedings, which so commence, terminate with a final award as provided in Section 32(1) or with an order under Section 32(2) of the Act. Proceedings in Court under the Act whether initiated before, during or after the termination of the arbitral proceedings, would not attract Section 26 of the Amendment Act.

Thus, the Court held that the Amendment Act has retrospective operation from October 23, 2015. After October 23, 2015, the Court cannot entertain an application for interim relief under Section 9(1) of the Act, where the arbitral tribunal has already been constituted, unless the Court is satisfied that circumstances exist under Section 9(3) of the Amended Act, which may not render the remedy provided under Section 17 efficacious.

¹⁰ Amendment Act came into force on 23rd October, 2015



The View of Bombay High Court

In *M/s. Rendezvous Sports World v. The Board of Control for Cricket in India*¹¹ the issue before the Bombay high Court was that when the application under Section 34 of the Act has been filed prior to the commencement of the Amendment Act, whether there would be an automatic stay on the enforcement of the award under Section 36 of the Act or whether the Award debtor has to make a separate application for stay under Section 36(2) of the amended Act.

The Court held that an application under Section 34 of the Act is not a continuation of the arbitral proceedings. As provided in the Act itself, the arbitral proceedings terminate on passing of the final award. The challenge to the arbitral award provided for in the Act is minimal. The only order that can be passed on the challenge under Section 34 is either of upholding the Award as it is or of setting it aside in its entirety, except where parts of the award are separable. Section 36 which pertains to the enforceability of an arbitral award cannot go along with the application for challenge to the arbitral award so as to form a package of rights.

The Court has given the plain literal meaning to the amended Section 36 and the use of verb “has been” was held to be in present perfect tense. Therefore, Section 36 of the Act would be applicable not only to cases where a petition under Section 34 of the Act is filed after October 23, 2015 but also to cases where a petition has been filed

before October 23, 2015. In other words, all the applications under Section 34 pending in the court for consideration will attract section 36(2) of the Amended Act.

The Court also held that the remedy available to an aggrieved award-debtor under Section 34 was not taken away by the Amendment Act. A vested right is available to the award-debtor only in the matter of challenge to the arbitral award, a provision which has remained intact and not been affected by the amendment. Section 36 of the Act pertains only to the enforcement and execution of an award.

In conclusion, the Court held that the application of amended Section 36 to the existing matters i.e. the applications under Section 34 of the Act, that are pending as on October 23, 2015 give the amendment a prospective effect and not retrospective effect.

The view of Delhi High Court

In *Ardee Infrastructure Pvt. Ltd. v. Ms. Anuradha Bhatia*¹², the issue before Delhi High Court was whether the phrase “to arbitral proceedings” used in first part of Section 26 of the Amendment Act includes court proceedings arising out of arbitration or not.

The court held that the pendency of any legal proceedings or otherwise would not come in the way of determining as to whether the right had accrued under the Act prior to amendment. The Court referred to

¹¹M/s. Rendezvous Sports World v. The Board of Control for Cricket in India, Chamber Summons No. 1530 of 2015 with 1532 of 2015. (Bombay High Court)

¹²Ardee Infrastructure Pvt. Ltd. v. Ms. Anuradha Bhatia, FAO(OS) No. 221/2016 (Delhi High Court)



*Thyssen*¹³ case and observed that the right to have the award enforced (which also comprises of the negative right of the award debtor to not have it enforced till his objections under Section 34 of the Act are heard and decided) is certainly an accrued right. Given the fact that the amended Section 36 takes away the right of an automatic stay of enforcement of an award, it is clear that the amended Section 36 would definitely impinge upon the accrued right of the party against whom the award is given after the arbitral proceedings have been held under the Act. Since an accrued right is affected, unless a contrary intention appears in the Amendment Act, the amendment would be treated as prospective in operation from the standpoint of commencement of the arbitral proceedings.

The Court observed that the Amendment Act has amended Section 9 as well as Section 17 of the Act. While Section 9 pertains to interim measures which may be directed by the court prior, during arbitral proceedings or after the making of the award, Section 17 deals with the interim measures which may be ordered by an arbitral tribunal. There would be serious anomaly related with these sections where the provisions of the Act would be saved only in respect of the proceedings before the arbitral tribunal and would not extend to court proceedings if arbitral proceeding commenced prior to October 23, 2015. If it is to be accepted, then, in respect of arbitral proceedings commenced prior to October 23, 2015, the amended provisions would apply to proceedings under Section 9 of the

Act, but not to Section 17 thereof. This would result in a serious anomaly.

Therefore, the Court held that the words “to arbitral proceedings” must be interpreted as “in relation to arbitral proceedings” which includes all court proceedings.

The view of Supreme Court

The Supreme Court on March 15, 2018 in *Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd*¹⁴ considered the interpretation of Section 26 of the Amendment Act.

The Court made a distinction between the two parts of Section 26. It held that the first part of Section 26 applies to only arbitral proceedings before the arbitral tribunal because the word “to” have been used instead of “in relation to” and commencement is mentioned with reference to Section 21 of the Act. Further, it referred to the heading of the Chapter V of the Act. While it held that the second part of Section 26 deals with the court proceedings which relate to the arbitral proceedings. The Court concluded that the Amendment Act is prospective in nature.

The Supreme Court also made a distinction with reference to automatic stay to the enforcement of the award under Section 36 of the Act. Under the old Act, if the award was challenged under Section 34, there used to be an automatic stay on the enforcement of the award. This automatic stay has been taken away by substituting Section 36 by the Amendment Act. An application for staying

¹³ *Thyssen Stahlunion GmbH v. Steel Authority of India Limited*: 1999 (9) S.C.C. 334.

¹⁴ *Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd.*, Civil Appeal Nos.2879-2880 (Arising out of SLP (C) Nos. 19545-19546 of 2016).



enforcement of award has to be filed on which judge has the discretion to grant stay. The Court held that the execution of an award is a procedural matter and there is no substantive right of the judgment debtor to resist execution. The amended Section 36 would apply to all cases including the cases in which Section 34 application is pending on the date of commencement of the Amendment Act.

Prospective Application of the Amendment Act

The Supreme Court has affirmed the view of the Bombay High Court¹⁵ which stated that the Amendment Act is applicable prospectively. However, the judgment of the Supreme Court is silent on the question of what would prospective application mean. The only direction it has given is through a distinction with respect to the application of Section 34 and automatic stay on the enforcement of the award.

In the further paragraphs, the points on which the amended Act would apply prospectively are discussed with reference to different opinions of Courts. Also with all due respect to the Supreme Court, I differ on the point of distinction made by the Court with reference to automatic stay on enforcement of Award under Section 36 of the Act when the Award is challenged under Section 34 of the Act.

1. **Amendment in Section 9 and Section 17**
Section 9 and Section 17 of the Act deal with interim measures ordered by the

¹⁵ Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd., Civil Appeal Nos.2879-2880 (Arising out of SLP (C) Nos. 19545-19546 of 2016).

court and arbitral tribunal respectively. Section 17(2)¹⁶ after amendment gives power to arbitral tribunal to make interim orders which are statutorily enforceable in same manner as orders of the court. This provision was not present in the Act.¹⁷ Also, Section 9(3)¹⁸ has been introduced by the Amendment Act which provides that the court shall not entertain an application under section 9(1) if the arbitral tribunal has already been constituted.

Since the Supreme Court has not laid down anything in relation to Section 9 and Section 17, and if the interpretation of Calcutta High Court in *Sri Tufaan*¹⁹ is to be accepted, it would result in serious contradiction between the enforcement of Section 9 and Section 17. For the cases in which arbitral proceedings have commenced before October 23, 2015 but are still pending, court proceedings would be conducted under amended Act and the arbitral proceedings would have to be

¹⁶ 17. **Interim measures ordered by Arbitral Tribunal (1)...**

(2) Subject to any orders passed in an appeal under section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were an order of the Court.]

¹⁷ Sundaram Finance Ltd v. NEPC India Ltd., (1999) 2 S.C.C. 479

¹⁸ 9. **Interim Measures etc. by court- (1)...**

(2)...

(3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application under subsection (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.

¹⁹ Sri Tufan Chatterjee v. Sri Rangan Dhar, Fmat No. 47 of 2016 (Calcutta High Court)



conducted under the Act. Thus the person seeking interim relief would be denied remedy since the court because of the restriction imposed by section 9(3) would not entertain his application. At the same time the person would also not be able to take recourse under Section 17 (under the Act), since there is no power conferred on the arbitral tribunal to enforce its order nor does it provide for judicial enforcement.

Therefore, because of this contradictory situation, the interpretation of Calcutta High Court should not be accepted. If we apply the Amendment Act prospectively as laid down by the Supreme Court and the Delhi High Court, there would be no such contradictions as the interim measure application will be governed by Section 9 of the Act in which the court has power to grant interim orders.

2. Amendment in Section 8 of the Act According to Section 8²⁰ of the Act, a non-signatory to the arbitration agreement could not be referred to a domestic arbitration by the court.²¹ However, Section 45²² provides

²⁰**8. Power to refer parties to arbitration where there is an arbitration agreement-** (1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer parties to arbitration.

²¹ Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya and Anr., (2003) 5 S.C.C. 531.

²²**45. Power of judicial authority to refer parties to arbitration**— Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made

that in arbitrations with a foreign seat, some non-signatories can be subjected to arbitrations without consent.²³

The amended Section 8(1)²⁴ uses the expression “one of the parties or any parties” and “refer parties to arbitration”. The expression “any person” in the Section clearly refers to the legislative intent of enlarging the scope of the words beyond the parties who are signatories to the arbitration agreement.²⁵

If the interpretation made by Calcutta High Court of Section 26 of the Amendment Act is to be accepted then in the case where an application under Section 8 is filed by a party to refer the dispute to arbitration involving a non-signatory, the court would have to adopt the Chloro Controls test²⁶, as required under the amended Section 8, and may

an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

²³ Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc. and ors. (2013) 1 S.C.C. 641.

²⁴**8. Power to refer parties to arbitration where there is an arbitration agreement**—(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.

²⁵ Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc. and ors. (2013) 1 S.C.C. 641.

²⁶ Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc. and ors. (2013) 1 S.C.C. 641.



refer the parties (including the non-signatory) to arbitration. However, the consequent arbitration would still be subject to the old regime as the arbitration started before amendment. For this reason, the arbitral tribunal would have no jurisdiction since the arbitral proceeding would then involve not just the parties, but also any person claiming through or under a party. It certainly cannot be that the intention of the Legislature was to have the arbitral tribunal and the courts apply different standards in relation to the same proceedings.

There would not be any such anomaly in relation to Section 8 if the Amendment Act is applied prospectively.

3. Amendment act is affecting accrued rights and therefore it would be prospective in operation

In *Thyssen*²⁷ case, where after considering several earlier decisions, the Supreme Court observed that it is not necessary that for the right to accrue legal proceedings must be pending when the Act comes into force. To have the award enforced when arbitral proceedings commenced under the Act, to get the award enforced was certainly an accrued right under the Act. In other words, all the aspects of enforceability of an award entail an accrued right both in the person in whose favour the award is made and against whom the award is pronounced.

This exactly covers the situation where the arbitral proceedings were commenced prior to October 23, 2015 and the award

was also made prior to October 23, 2015 but the petition under Section 34 had been filed after October 23, 2015. The right to have the award enforced (which also comprises of the negative right of the award debtor to not have it enforced till his objections under Section 34 are heard and decided) is certainly an accrued right.²⁸

The amended Section 36 takes away the right of an automatic stay of enforcement of an award. The amendment introduced in Section 36 by the Amendment Act would definitely impinge upon the accrued right of the party against whom the award is given after the arbitral proceedings have been held under the provisions of the Act. Since an accrued right is affected, unless a contrary intention appears in the amending statute, the amendments would have to be treated as prospective in operation.²⁹ The distinction made by the Supreme Court takes away the accrued right of the party against whom the award is given and hence must be rectified.

4. Section 6 of General Clauses Act will apply

Substitution of a provision results in repeal of the earlier provision and its replacement by the new provision.³⁰ Substitution of Section 36 of the Act by the Amendment Act amounts to repeal of

²⁷ *Thyssen Stahlunion GmbH v. Steel Authority of India Limited*: 1999 (9) S.C.C. 334.

²⁸ *Ibid.*

²⁹ See *Colonial Sugar Refining Co. Ltd. v. Irving*, 1905 A.C. 369 (U.K.), *Hoosein Kasam Dada (India) Ltd. v. State of Madhya Pradesh*, A.I.R. 1953 S.C. 221.

³⁰ *State of Rajasthan v Mangilal Pindwal*, (1996) 5 S.C.C. 60



Section 36 and part repeal of the Act. And therefore the provision of Section 6 of the General Clauses Act ³¹ which operates in the situation of repeal of a Statute, becomes effective and applicable. First part of Section 26 of the Amendment Act, which is a saving provision, does not provide for the post-award proceedings. Therefore, the section is necessarily non-exhaustive. A saving provision is not exhaustive of the rights that are saved and just because a right is not expressly saved by the saving provision, it does not mean that such right stands extinguished. A non-exhaustive savings clause leaves it to Section 6 of the General Clauses Act to determine which additional rights are saved. Unless a repealing statute expressly extinguishes a vested right or expressly affects a pending legal proceedings under the repealed statute, the accrued vested right, or legal proceeding is not affected.

³¹ Section 6: Effect of Repeal- where this act or any [central Act] or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not--

- (a) ...
- (b) ...
- (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or
- (d)...
- (e) affect any investigation, legal proceedings or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid;

and any such investigation, legal proceedings or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed.”

³² Commissioner of Income Tax, U.P. v. M/s. Shah Sadiq and Sons. (1987) 3 S.C.C. 516.

Since part one of Section 26 of the Amendment Act does not expressly deal with post-award proceedings and appeals arising from the arbitration proceedings commenced prior to October 23, 2015, the general law in relation to repeal would be applicable. It would mean that the amended provisions of the Act will not apply to the court proceedings arising out of arbitral proceedings commenced prior to October 23, 2015.

Conclusion

The Report of High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India chaired by Justice B.N. Srikrishna (Retired) recommended that permitting the Amendment Act to apply to pending court proceedings related to arbitration commenced prior to October 23, 2015 would result in uncertainty and prejudice to parties, as they may have to be heard again. ³³ It may also not be advisable to make the Amendment Act applicable to fresh court proceedings in relation to such arbitrations, as it may result in an inconsistent position. The committee recommended that the applicability of the Amendment Act be limited to arbitrations commenced on or after October 23, 2015 and related court proceedings.

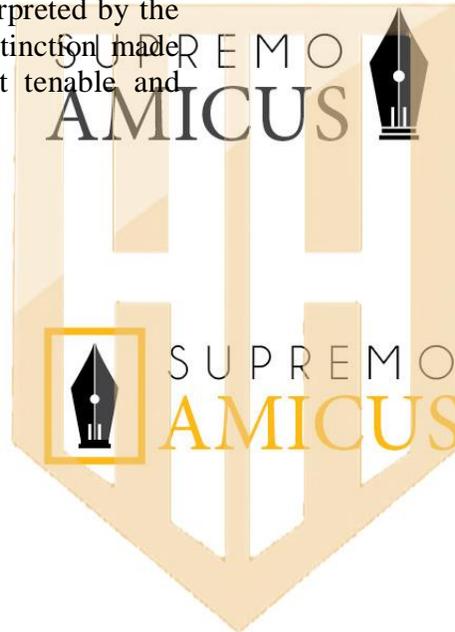
The Union Cabinet has also approved the Arbitration and Conciliation (Amendment)

³³ Report of High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India submitted to Ministry of Law and Justice (available at: <http://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf>).



Bill, 2018.³⁴ The proposed bill incorporates the recommendations of Justice Srikrishna's Committee report. It provides that the Amendment Act would be prospectively applicable to all arbitral proceedings and court proceedings in relation to such arbitral proceedings. The Supreme Court in its judgment has asked the law ministry to take into consideration the judgment before passing any amendment.

In light of these policy considerations and the arguments stated, it is evident that the Amendment Act has to be applied prospectively as has been interpreted by the Supreme Court. However, distinction made by the Supreme Court is not tenable and must be rectified.



³⁴ Press Information Bureau, Government of India, Ministry of Law & Justice, *Cabinet approves the Arbitration and Conciliation (Amendment) Bill, 2018*, 7th March 2018 available at: <http://pib.nic.in/newsite/PrintRelease.aspx?relid=177128>